

Chemical Leaman Tank Lines, Inc. and Carl Edgefield. Case 15-CA-8609

15 June 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 5 August 1983 Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions with a supporting brief as well as a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and, for the reason stated below, has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by threatening to discharge, and thereafter discharging, employee Carl Edgefield for filing grievances against it. The Respondent, on the other hand, claims that Edgefield was lawfully discharged for striking his supervisor, Joseph Fox, and further argues that the Board should defer to a decision of the Southern Tank Line Grievance Committee² which upheld the discharge. In his decision the judge agreed with the Respondent that the Board should defer to the Committee's decision. The General Counsel contends that deferral to the Committee's decision would be inappropriate as the unfair labor practice issue was presumably neither presented to nor decided by the Committee. We find no merit to the General Counsel's contention; rather, we agree with the judge that deferral to the Committee's decision is appropriate here.

Recently, in *Olin Corp.*, 268 NLRB 573 (1984), the Board held that in determining whether or not to defer to an arbitrator's award under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), it would henceforth view the unfair labor practice issue before the Board as having been adequately considered by an arbitrator if (1) the contractual issue is factually

parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The Board further held that, if a respondent can show that an arbitration concerning the matter before the Board has already occurred, then the burden would be on the General Counsel to demonstrate that "there are deficiencies in the arbitral process requiring the Board to ignore the determination of the arbitrator and subject the case to de novo review."

The contractual issue before the Committee and the statutory issue before us are, as found by the judge, factually parallel. At the hearing before the Committee the Respondent claimed it discharged Edgefield for hitting his supervisor, Fox, in the stomach. Edgefield denied having hit Fox and claimed that Fox harassed and finally discharged him for filing numerous grievances against the Respondent.

In the unfair labor practice proceeding the General Counsel alleged that the Respondent discharged Edgefield for filing grievances, and the Respondent contended it discharged him for hitting his supervisor. The factual question that the Board would have to decide, if it were to rule on the merits of the statutory issue, is whether Edgefield was discharged for filing grievances or for hitting his supervisor. Resolution by the Committee of the contractual issue would, of necessity, require it to resolve this very issue. As indicated, the Committee upheld Edgefield's discharge and, in doing so, in effect, held that Edgefield had hit Fox and that this misconduct warranted his discharge.

Further, it is apparent from the record evidence that the facts relevant to resolving the unfair labor practice issue were fully presented to the Committee. During the hearing in this case Edgefield testified that all the facts presented to the judge during the hearing concerning his claim that he was discriminated against for filing grievances had been presented to the Committee. In light of his admission we conclude that the facts necessary for deciding the statutory issue were indeed before the Committee.

Having found that the contractual and statutory issues are factually parallel and that the Committee was presented generally with the facts relevant to resolving the statutory issue, we conclude that the statutory issue has, in accordance with the *Olin* standards, been adequately considered by the Committee.³ We note further that the General Counsel

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The Committee is composed of an equal number of employer and union representatives.

³ Having found that the Committee has adequately considered the unfair labor practice issue in accordance with the *Olin* standards, we disavow the judge's comment that "it does not appear that the Committee

Continued

has neither alleged nor presented any evidence to indicate any deficiencies in the Committee's proceedings that would warrant a de novo review by this Board.⁴ For these reasons we conclude that deferral to the Committee's decision is warranted here.⁵ Accordingly, we shall adopt the judge's recommended Order and shall dismiss the complaint in its entirety.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER ZIMMERMAN, concurring.

For the reasons stated in my dissenting opinion in *Olin Corp.*, 268 NLRB 573 (1984), I cannot agree with my colleagues that deferral to the Grievance Committee's decision is appropriate here.

In the instant case the judge, although recommending that the Board defer to the Committee's findings,¹ nevertheless stated that, based on the testimony of those present at the grievance hearing, "it does not appear that the statutory question was considered or decided by the Committee." Thus, although the Committee may have found that the Respondent had just cause under the contract to discharge Edgefield for hitting Fox, it did not, as noted by the judge, consider "the issue of whether the sole or even a partial motive behind the discharge of Edgefield was his having engaged in protected activity." A plain reading of the Committee's decision clearly supports the judge's finding in this regard, for, aside from some vague reference to Fox's alleged harassment of Edgefield and the Committee's court denial, without explanation, of Edgefield's grievance, there is nothing in that decision remotely to suggest that the unfair labor practice issue was either presented to or considered by the Committee. In the absence of such evidence I would not defer to the Committee's decision here.²

I do, however, agree with the judge's finding that Edgefield's discharge did not violate Section 8(a)(1) and (3) of the Act. Crediting the testimony of Fox,³ the judge found that Edgefield indeed struck Fox and that Fox had not threatened to

"get" Edgefield for filing grievances. Noting that there was no credible evidence to suggest "a casual [sic] connection between Edgefield's grievances and discharge," the judge concluded that Edgefield was lawfully discharged for hitting Fox. The record fully supports these findings. Accordingly, on the merits, and on that basis alone, I join my colleagues in dismissing the complaint.

¹ Although the judge's decision issued before the Board adopted its new standard in *Olin Corp.*, he nevertheless applied an *Olin*-type standard to conclude that deferral was appropriate. As indicated, I do not agree with the standard adopted by the Board in *Olin* and similarly find the judge's standard unacceptable.

² As noted in my dissenting opinion in *Olin*, the burden of producing such evidence properly belongs on the party seeking deferral and not, as my colleagues insist, on the General Counsel.

³ Like my colleagues I find no basis for reversing the judge's credibility findings.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on March 10 and 11 and June 1, 1983, on the General Counsel's complaint which alleged principally that on May 3, 1982, the Respondent discharged Carl Edgefield in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. It is also alleged that in mid-April and again on April 30, 1982, the Respondent threatened Edgefield with termination for filing grievances against the Respondent.

The Respondent generally denied having committed any unfair labor practices and affirmatively contends that it discharged Edgefield because "he physically accosted Joseph C. Fox [the Respondent's terminal manager] by striking him in the chest on April 30, 1982 . . ."

On the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is a corporation licensed to do business in the State of Louisiana, and is engaged nationally in the transportation of liquid and dry bulk products by tank truck from terminals maintained throughout the United States and Canada. The terminal where Edgefield was employed is located in Luling, Louisiana. The Respondent annually derives revenues in excess of \$50,000 from transporting liquid and dry bulk products throughout the United States and Canada. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

General Truckdrivers, Chauffeurs, Warehousemen and Helpers Union No. 270, affiliated with the International

considered the issue of whether the sole or even a partial motive behind the discharge of Edgefield was his having engaged in protected activity." Because the Committee did hear the facts on the issue, its decision effectively, although not explicitly, did decide the issue.

⁴ Thus, the General Counsel has not alleged that the Committee's decision fails to meet the other *Olin* criteria. The General Counsel contends only that the Committee did not consider the statutory issue. As found herein, that contention is without merit.

⁵ In view of our decision to defer to the Committee's findings, we deem it unnecessary to rule, as did the judge, on the merits of the unfair labor practice allegation.

Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

Among others, the Union represents a unit of truck-drivers employed by the Respondent at the Luling, Louisiana terminal and has negotiated successive collective-bargaining agreements with the Respondent. The Respondent and the Union are now and have been parties to the Master Tank Line Agreement.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Carl Edgefield was hired by the Respondent on November 10, 1979, and terminated in December, the exact date being a matter of dispute which was resolved in favor of Edgefield by decision of the Southern Conference Tankline Grievance Committee on January 16, 1980. This Committee ordered that Edgefield be reinstated with his original seniority date but that his monetary claim be denied.

Edgefield was again discharged on April 26, 1980, for alleged dishonesty. Again Edgefield filed a grievance which was resolved in his favor by the Southern Conference Tank Line Grievance Committee on May 6, 1980. He was ordered reinstated the full seniority and backpay.

Both before and after his second return to work, Edgefield filed numerous other grievances under the collective-bargaining agreement alleging a variety of violations of contract by Joseph Fox, the Respondent's terminal manager at Luling. Edgefield contended that Fox was harassing him and discriminating against him by giving assignments to junior drivers, denying him appropriate pay and so forth. The grievances, according to the stipulated exhibits in this matter, were numerous. As Edgefield testified, and as the Respondent agreed, Edgefield won some and he lost some.

As a result of lack of work and his relatively low seniority, throughout much of 1981 and the first months of 1982, Edgefield was on layoff. However, work improved and in mid-April Edgefield was recalled. On his recall he forthwith began filing grievances alleging various breaches of the contract by Fox. It was at this time Fox allegedly told Edgefield, "I'm going to fire you. I'm definitely going to get you." Edgefield testified that Fox threatened to fire him many times.

Edgefield returned from assignment on April 29 and on the morning of April 30 went to the terminal. Although the parties somewhat disagree concerning what transpired on the trip, and the resulting dispute was between Edgefield and Fox, there is no question that Edgefield and Fox had a confrontation on April 30.

What this case is about is whether Edgefield hit Fox in the stomach during the confrontation. Fox testified that Edgefield hit him that day and other witnesses testified Fox told them so and showed a bruise. Edgefield claims that he did not even touch, much less hit, Fox. Edgefield's wife was present part of the time and she testified that, during her presence, she did not see any hitting.

In any event, Fox contacted higher supervision and it was determined to discharge Edgefield for having as-

saulted Fox. A termination letter was sent on May 3 and received in the Union's office on May 4. Edgefield filed a grievance protesting his termination and the matter was presented to the Southern Conference Tank Line Grievance Committee on June 9, 1982. In its decision, the Committee recited the facts leading to and the confrontation between Edgefield and Fox. The Committee also noted that "the grievant felt he had been continually harassed" by Fox and that he had not, as Fox testified, hit him. The decision of the Committee was: "Based upon the facts presented, the grievance is denied."

B. Analysis and Concluding Findings

1. Deferral to the Grievance Committee decision

The Respondent contends the Board should defer to the decision of the Committee citing *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

The General Counsel argues that deferral here is inappropriate inasmuch as the unfair labor practice issue was neither presented to nor decided by the Grievance Committee, citing *Suburban Motor Freight*, 247 NLRB 146 (1980) and *Professional Window Cleaning Co.*, 263 NLRB 136 (1982).

Although Edgefield and the Union did present to the Committee their contention that Fox had been harassing Edgefield because Edgefield had filed many grievances, it does not appear that the Committee considered the issue of whether the sole or even a partial motive behind the discharge of Edgefield was his having engaged in protected activity. As far as I am able to determine from the testimony of those present at the grievance hearing (particularly the Union's business agent Eugene Brown) and the Committee's written decision it does not appear that the statutory question was considered or decided by the Committee.

On the other hand, all the facts necessary to decide the statutory issue were presented. Nothing was withheld from the Committee. It is obvious that the Committee decided that Edgefield hit Fox. Further, it is clear that the Committee concluded that for an employee to strike a supervisor is just cause for discharge under the contract, there being no suggestion there, or here, that such activity had been condoned in the past.

In effect, the General Counsel argues that, since it is unclear whether the Committee decided the statutory issue, deferral is inappropriate. Further, I can, and should, find that Edgefield did not hit Fox.

The only material fact in controversy was decided by the Committee against Edgefield. Even though the Committee did not analyze the statutory question, the issue here is whether that factfinding should be accepted or whether the General Counsel (and Edgefield) can relitigate it. I conclude deferral is appropriate. The statutory and contractual questions are parallel. The factual finding by the Committee is dispositive of the unfair labor practice allegation and is consistent with the record before me. There is no evidence of disparate treatment or that striking a supervisor had been condoned in the past.

Under current Board policy, deferral to an arbitrator's ultimate decision that a discharge is for cause is not appropriate unless the arbitrator considered the unfair labor practice question. This is so because the contract and statutory issues are different requiring different considerations and analysis. E.g., *Raytheon Co.*, 140 NLRB 883 (1963); *Suburban Motor Freight*, supra; *Professional Window Cleaning Co.*, supra.

However, notwithstanding whether the statutory question was analyzed and decided, the Board will defer to the arbitrator's factual findings, if the proceeding meets the *Spielberg* tests. *Atlantic Steel Co.*, 245 NLRB 814 (1979).

In *Atlantic Steel*, during the course of presenting a grievance, the discharged employee called his supervisor an opprobrious name. The Board deferred to the arbitrator's decision that the discharge was for just cause even though the arbitrator did not decide the unfair labor practice issue (whether the true motive for the discharge was presenting a grievance.) Said the Board at 814 fn. 2:

[T]here is a factual parallel between the contractual and unfair labor practice questions which makes the arbitrator's factual findings controlling for purposes of resolving the unfair labor practice. Indeed, the arbitrator's decision implicitly resolved the unfair labor practice.

Thus where the arbitration proceeding is fair, complete, and comprehensive, the Board will defer to the arbitrator's factfindings, even though the statutory issue was not resolved. *Chemical Leaman Tank Lines*, 251 NLRB 1058 (1980). Not to defer in a case such as this would be to substitute

... the Board's judgment for that of arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes, "as part and partial of the collective-bargaining process." *International Harvester Co.*, 138 NLRB 923, 929 (1962).

The contractual issue turned on a disputed issue of fact which the Committee resolved in favor of the Respondent and against Edgefield. The Committee found Edgefield hit Fox. I believe that finding should be accepted by the Board, there being no contention that the grievance proceeding was not fair and complete.

2. Edgefield's discharge was not violative of the Act

Striking a supervisor is clearly the sort of activity for which one can lawfully be discharged. The fact that Edgefield filed many grievances in the past is not sufficient to support a conclusion that hitting Fox was not the true reason he was discharged. There is no evidence of disparate treatment that any other employee, having struck a supervisor, received lesser or no punishment. Edgefield did hit Fox during another confrontation at the time of his layoff in June 1981. Since Edgefield had been laid

off, it was determined simply to note this event in his personnel file.

The only evidence linking Edgefield's many grievances to his discharge is his testimony that following his return to work in 1980 he filed a grievance and Fox told him that "you're up to the same old shit." And when Edgefield told Fox on April 30, 1982, that he intended to file a grievance concerning the 9-1/2 hours of pay, Fox said it would do him no good and that "he would get me." Fox denied having made such statements.

While I doubt such statements are sufficient to vitiate a discharge for hitting a supervisor, I conclude they did not occur.

On all the facts, and my observation of witnesses, I am constrained to discredit Edgefield and credit Fox. It may very well be that they had discussion and no doubt they did have confrontations during the course of Edgefield's employment. Indeed, Fox had confrontations with all employees, and generally was not well liked. However, he was credible. In fact, he not only has no interest in the outcome of this matter but if anything would not be disposed to testify favorably for the Respondent. In late 1982 Fox was terminated by the Respondent.

There is no credible evidence suggesting a casual connection between Edgefield's grievances and his discharge. Further, during the course of his employment, Edgefield filed many grievances alleging harassment by Fox. Had the Respondent been disposed to discriminate against Edgefield because he had filed grievances, it seems more reasonable that the Respondent would not have recalled him from a protracted layoff. The fact that Edgefield was recalled tends to suggest that his filing grievances was not a matter of particular concern to Fox or to the Respondent generally. Indeed the Respondent is involved in defending many grievances by many employees.

I therefore conclude that Edgefield was discharged because he hit Fox on April 30, 1982. In doing so, the Respondent did not violate Section 8(a)(1) or 8(a)(3) of the Act.

3. The 8(a)(1) activity

The allegations of 8(a)(1) violations concern the statements Fox is supposed to have made to Edgefield in mid-April and on April 30. Since I find they did not happen, I conclude the Respondent did not thereby violate Section 8(a)(1).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommendation¹

ORDER

The complaint is dismissed in its entirety.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.